IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 23579-3-III**
Respondent and Cross-Appellant,	)	**Division Three**
v.	)	
CORY G. PRESTON,	)	**UNPUBLISHED OPINION**
Appellant.	)	

KULIK, J.—Cory Preston appeals his conviction of first degree rape of a child asserting there was insufficient evidence to support the conviction. He also contends the court should have severed the two rape counts and that double jeopardy prevents punishment for convictions for rape of a child and assault of a child arising out of the same act. On cross-appeal, the State challenges the trial court's conclusion that it lacked the authority to impose an exceptional minimum sentence. Sufficient evidence supports the first degree rape conviction, there is no violation of double jeopardy, the court did not err by refusing to sever the rape charges, and the imposition of an exceptional minimum sentence does not violate Mr. Preston's Sixth Amendment rights. We affirm the

convictions and remand for sentencing consistent with *State v. Clarke*, 156 Wn.2d 880, 134 P.3d 188 (2006).

FACTS

Cory Preston moved into Alyson Zion's residence on August 28, 2002. Mr. Preston provided childcare for Ms. Zion's two children while she attended school. On October 8, three-year-old C.Z. told his mother that Mr. Preston had hurt him. Ms. Zion looked for injuries or bruising on C.Z., but did not find anything. Later, C.Z. complained of abdominal pain. When his pain got progressively worse, Ms. Zion took C.Z. to the Holy Family Hospital emergency room.

C.Z. was diagnosed with appendicitis and transferred to Sacred Heart Medical Center for surgery. During the surgery, early on October 9, the surgeon found no evidence of appendicitis, but did find evidence of blood in the abdominal cavity. The surgeon examined C.Z.'s small intestine, but found no injury. A CAT[1] scan did not reveal any injury to C.Z.'s solid organs. While the surgeon could not identify the source of the blood in C.Z.'s abdomen, the radiological findings were consistent with appendicitis and C.Z.'s white blood cell count was consistent with an infection or inflammation. Ms. Zion had not informed the surgeon of C.Z.'s statements indicating possible sexual abuse.

[1] Computerized Axial Tomography

On the morning of October 17, Ms. Zion left C.Z. in Mr. Preston's care. At noon, Mr. Preston called Ms. Zion to tell her that C.Z. was ill and vomiting. Later, Ms. Zion's brother, Anthony Zion, arrived at the residence to take C.Z. to his mother. According to Mr. Zion, C.Z. was lethargic and looked unhealthy. Mr. Zion carried C.Z. to his car, and C.Z. vomited three or four times during the drive to meet Ms. Zion. C.Z. was then taken to Sacred Heart where his medical condition was determined to be life threatening. Emergency surgery revealed a six centimeter laceration on the interior wall of C.Z.'s rectum. After the surgery, C.Z. made several statements to his sister, uncle, and grandparents that Mr. Preston had placed his penis in C.Z.'s anus.

Mr. Preston was arrested and interviewed by police concerning C.Z.'s injuries. Mr. Preston denied anally raping C.Z. However, Mr. Preston admitted that on October 17, he was watching a pornographic movie while C.Z. was taking a nap. When C.Z. came out of his room and asked Mr. Preston what the people were doing in the movie, Mr. Preston obtained a dildo and inserted it several times into C.Z.'s anus. When the dildo was pulled out, C.Z. cried and complained of a stomach ache.

Mr. Preston was charged with two counts of first degree rape of a child and one count of first degree assault of a child with sexual motivation. Mr. Preston moved unsuccessfully to sever count I from the remaining counts. Mr. Preston waived his right to trial and was found guilty at the conclusion of a bench trial. The prosecutor sought an

exceptional sentence, taking the position that *Blakely*[2] did not apply to the imposition of a minimum term sentence under RCW 9.94A.712. The court concluded it did not have the authority to impose an exceptional sentence, and imposed a sentence at the top end of the standard minimum range.

ANALYSIS

1. Was the evidence sufficient to support Mr. Preston's conviction for the first degree rape of a child charge set forth in count I?

Mr. Preston contends there is insufficient evidence to convict him of first degree rape of a child. Specifically, Mr. Preston contends the evidence fails to establish that a rape occurred within the charged period or that Mr. Preston used his penis to penetrate C.Z.

When reviewing the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

A defendant claiming insufficiency of the evidence admits the truth of the State's

[2] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

evidence and all inferences that can reasonably be drawn therefrom. *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997). Circumstantial evidence is not considered to be any less reliable than direct evidence. *Id.* at 38; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A fact finder is permitted to draw inferences from circumstantial evidence so long as these inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999).

In Count I of the second amended information, Mr. Preston was charged with first degree child rape for events "on or about between September 2, 2002 and October 8, 2002." Clerk's Papers at 75. C.Z. was taken to the hospital on October 8, and the surgery took place early on October 9. The surgeon observed fresh blood inside his abdominal cavity, but the source of the blood had already healed. The surgeon estimated that the bleeding had started four to six hours earlier, or, at the most, half a day earlier. In view of the October 17 injury, the surgeon opined that the blood observed during the first surgery could have been caused by an injury to the rectum. There is sufficient evidence to support the conclusion that the offense charged in Count I occurred within the charging period, even though the surgery took place early on October 9.

Mr. Preston also challenges the court's finding that he used his penis to penetrate C.Z. Mr. Preston points out that C.Z. told his sister that "'Cory stuck his penis up my butt,'" but C.Z. testified at trial that he never saw Mr. Preston's "front privates." Report

of Proceedings at 1422, 1445-46. Inconsistencies in the evidence do not mean that the evidence is insufficient. This court reviews findings of fact to determine whether they are supported by substantial evidence. When conducting this review, this court may not weigh the evidence or substitute its findings for those of the trial court where there is ample evidence in the record to support the trial court's determination. *See Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Here, there is ample evidence to support the trial judge's findings of fact.

2. Did the court err by failing to sever Count I from the remaining counts?

CrR 4.3(a)(2) permits a trial court to join two or more offenses when they are of similar character or where the offenses are based "on a series of acts connected together or constituting parts of a single scheme or plan." *See State v. Russell*, 125 Wn.2d 24, 62, 882 P.2d 747 (1994). The underlying principle behind this rule ensures that the defendant receives a fair trial untainted by undue prejudice. *State v. Bryant*, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998).

CrR 4.3(a)(2) is construed expansively to conserve judicial and prosecution resources. *Id.* at 864. Offenses properly joined under CrR 4.3(a) may be severed, if the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense. CrR 4.4(b); *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990); *State v. Cotten*, 75 Wn. App. 669, 686, 879 P.2d 971 (1994). A

defendant seeking severance has the burden of demonstrating that the joinder of offenses would be so manifestly prejudicial as to outweigh the concern for judicial economy. *Bythrow*, 114 Wn.2d at 718; *Cotten*, 75 Wn. App. at 686. The trial court's refusal to sever counts is reversible only upon a showing that the court's decision constituted a manifest abuse of discretion. *Bythrow*, 114 Wn.2d 717.

The State's evidence here was strong on each count. Mr. Preston confessed to the second incident, and the first incident was supported by C.Z.'s statements to his sister and the medical evidence. The defenses are clear in connection with both incidents. In each instance, the defense was a denial or a claim of insufficient evidence. And most of the evidence would have been admissible in separate trials. The second surgery would be necessary to explain the first surgery. The medical evidence and witnesses would be the same. More importantly, the first rape would have been admissible in the second trial to establish Mr. Preston's lustful disposition toward C.Z. *See State v. Camarillo*, 115 Wn.2d 60, 70, 794 P.2d 850 (1990).

The court correctly denied Mr. Preston's motion to sever.

3. Was Mr. Preston's right against double jeopardy violated when the court imposed sentences for first degree rape in Count II and first degree assault of a child in Count III?

The double jeopardy clauses of the state and federal constitutions protect against

multiple punishments for the same offense and against a later prosecution for the same offense after acquittal or conviction. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). Where a defendant's conduct supports charges under multiple criminal statutes, the court must examine the legislative intent to determine whether the charged crimes constitute the same offense and thus violate double jeopardy. *Id.*

If legislative intent is not clear, this court must apply the *Blockburger* test. *Blockburger v. United States,* 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Referred to as the "same evidence" or "same elements" test, the *Blockburger* test provides that if each crime contains an element that the other does not, the court should presume that the crimes are not the same for purposes of double jeopardy. *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995); *Blockburger*, 284 U.S. at 304.

If the evidence to prove one crime would also completely prove a second crime, the two crimes are the same in law and fact under *Blockburger*. *Orange*, 152 Wn.2d at 820. The question here is whether first degree rape of a child and first degree assault with sexual motivation constitute the same offense under the *Blockburger* test.

First degree rape of a child requires proof that Mr. Preston engaged in sexual intercourse with a victim who was less than 12 years old, that Mr. Preston was at least 24 months older than the victim, and that the victim was not married to Mr. Preston. RCW 9A.44.073(1). First degree child assault, as charged here, required proof that the victim

was intentionally assaulted, and recklessly suffered great bodily injury, and was less than 13 at the time of the offense. RCW 9A.36.120(1)(b)(i). The prosecutor filed a special allegation of sexual motivation under RCW 9.94A.835.

Here, proof of one of the charged crimes does not completely prove the second crime. Proof that Mr. Preston had intentionally assaulted C.Z. would not also prove that Mr. Preston committed child rape by engaging in intercourse when he was not married to the victim. Likewise, proof of child rape, would not prove that the victim was intentionally assaulted and recklessly suffered great bodily injury. The elements of child rape do not include an intent requirement or an injury requirement.

Mr. Preston contends that once the rape was proved, the elements of assault were also proved. But this argument is without merit. Assault requires a showing of intent and that the victim recklessly suffered great bodily injury. Proof of rape does not prove assault.

Mr. Preston's arguments are based on his belief that the two crimes must be the same because they are proved by the same act—the rape of C.Z. This is not the analysis adopted by the courts. In fact, several cases recognize that similar crimes may be committed by the same act without fulfilling the requirements of the *Blockburger* test. In *Calle*, the court concluded that one act of intercourse could support convictions for both incest and second degree rape. And *State v. Jones,* 71 Wn. App. 798, 825, 863 P.2d 85

(1993), held that child molestation and child rape were not the same crime under *Blockburger*.

The trial court correctly sentenced Mr. Preston for both rape and assault.

4. Did the court have the authority to impose an exceptional minimum sentence?

The prosecutor sought an exceptional minimum sentence based on five potential aggravating factors. The trial court concluded that it did not have the authority to impose an exceptional minimum sentence unless Mr. Preston waived his right to have a jury hearing on the issue. The court imposed a sentence at the top end of the standard minimum range—160 months.

The question here is whether *Blakely* applies to the imposition of an exceptional minimum sentence under RCW 9.94A.712. The Supreme Court resolved this issue in *Clarke*, 156 Wn.2d at 886, holding that "*Blakely* does not apply to an exceptional minimum sentence imposed under RCW 9.94A.712 that does not exceed the maximum sentence imposed."

We therefore affirm the convictions and remand for resentencing consistent with *Clarke*.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, J.

WE CONCUR:

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Sweeney, C.J.

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Brown, J.